of doubtful authority. It was there held that a mill-owner whose dam caused *underground* streams of water to set back and injure the land above, is not liable therefor at common law. But this is in direct conflict with *Bassett* v. *Salisbury Manuf. Co.*, 43 N. H. 569, a carefully considered case.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Court of Common Pleas of New York.

MARY E. HYNES ET AL. *v.* KATE McDERMOTT ET AL.

By the law of New York marriage is a civil contract and nothing more.

The validity of a marriage is to be determined by the *lex loci contractus.*

An agreement of marriage *per verba de præsenti* is a valid marriage by the common and civil law as well as by the law of New York; and in the absence of evidence of the law of France the courts of New York will presume such a marriage in France to be valid.

THIS was an action of ejectment by the plaintiff, as widow and heirs at law of William R. Hynes, deceased, for the recovery of mesne profits of premises situated in the city of New York.

The action was originally commenced against the tenants in possession, and was subsequently amended by the joinder of the heirs at law of the deceased intestate, the acknowledged owner of the premises in dispute.

John Hallock Drake, for appellants.

William H. Secor and *Joseph H. Choate*, for respondents.

The opinion of the court was delivered by

LARREMORE, J.—The main question to be decided is that which relates to the marriage between the parties and the legitimacy of the children as a result of such marriage. In addition to the general issue, the judge, at trial term, submitted the following special findings of fact:

First. Did William R. Hynes and the plaintiff, Mary Eliza Hynes, at 169 Cleveland street, in the city of London, enter into an agreement to be then and thenceforward man and wife, upon the occasion in the evening of the last Wednesday of May 1871, testified to by Mr. and Mrs. Ardray?

Second. Did William R. Hynes and the plaintiff, Mary Eliza Hynes, thenceforward cohabit together in the open and acknowledged relation of man and wife?

Third. Was William R. Hynes, at the time of said agreement, a citizen of the state of New York and temporarily sojourning in England?

Fourth. Was the agreement made with the *bona fide* intention, on the part of William R. Hynes, to contract a valid marriage, according to the law of the state of New York, and to return to the said state and reside there with the said Mary E. Hynes, as his wife, and did that intention continue up to the time of his death?

Fifth. Did William R. Hynes, deceased, and Mary E. Hynes, in May or June 1871, while crossing the English channel, enter into an agreement by which they consented to take each other then and there as man and wife?

Sixth. Did William R. Hynes, deceased, and Mary E. Hynes, in June 1871, in France, enter into an agreement by which they consented to take each other then and there as man and wife?

Seventh. Is the infant plaintiff, William R. Hynes, the child of William R. Hynes, deceased?

Upon all of said special findings the jury found in the affirmative. This appeal being from the order denying the motion for a new trial on the judge's minutes as well as from the judgment, brings all the evidence up for review at the General Term. There can be no doubt of the right of that tribunal to review and reverse a verdict which, upon due examination, appears to have been influenced by passion or prejudice, or one that is clearly against the weight of evidence: *Macy* v. *Wheeler*, 30 N. Y. 237; *Courtney* v. *Baker*, 60 Id. 6; *Boos* v. *World Mutual Life Ins. Co.*, 64 Id. 242. But such an appeal should be addressed to sound discretion and an unmistakable conclusion upon the facts as found. We are called upon to deal with the validity of a marriage affecting rights of property within the state. If it shall appear that the findings of the jury support the existence of such a contract, and the various exceptions in the case are shown to be untenable, then the judgment appealed from must be affirmed.

The question, what constitutes a legal marriage, is always important, and often difficult to answer. The peculiar nature and sacredness of the relation, the delicate interests involved, and the grave responsibilities depending upon it, invite and demand the most careful judicial scrutiny and discrimination.

Elementary writers have busied themselves with the discussion whether the marriage relation was a mere contract or a status.

But legislatures have prescribed the essentials, and courts of law have pronounced upon the validity of that relation. Necessarily, then, where independent sovereignties differ, diversity of authority upon this subject must exist. In our own country we often find a marriage valid in one state unrecognised in another.

What then is to govern where authorities conflict? Shall it be the *lex domicilii*, the *lex contractus*, or the *lex loci rei sitæ?*

Judge STORY appears to have regarded marriage as "an institution of society, and not merely a contract which the parties thereto might dissolve at pleasure." This would seem to be the naturally reasonable and moral aspect of such a relation. But, nevertheless, the authorities in this state point to the conclusion that marriage is nothing more or less than a civil contract.

We come then to the consideration of the alleged marriage between the parties as shown by the testimony. It is not claimed that its validity has been established in accordance with the law of England; but the proposition is urged that the reiteration of the marriage vow on the British Channel, and in France, solemnized an act which it was the intention of the parties to consummate.

The testimony of Mrs. Hynes is unimpeached. The jury believed it, and an appellant court, in the absence of gross error or mistake, should hesitate to disregard their findings.

It is apparent then, if we are to accept the testimony produced and the verdict rendered, that it was the intention of the parties to enter into the marriage relation. That such relation was followed by its recognition by the deceased, cohabitation and birth of offspring is beyond dispute; and we are now asked, as against the weight of evidence, to reverse the judgment rendered. The facts thus established invoke the old rule of law "*semper præsumuntur pro matrimonio*," and the burden of proof is thus cast upon the defendants. What have they offered to disprove this fact of marriage?

A registry of births with which Mrs. Hynes is not shown to have been connected, and an offer of proof of a lease of premises taken in her former name of Saunders, which she failed to identify.

The jury have found, as above shown, that Wm. R. Hynes, at the time of his alleged contract of marriage, was a citizen of the state of New York, and temporarily sojourning in London; and that the parties to said contract entered into the same with the intention of returning to and residing in the state of New York.

Mr. Hynes owned property in the city of New York, that he

once resided here is undisputed, and I cannot, confronted by the verdict of the jury, hold that he was not a resident of this state at the time of his alleged marriage.

This court is a record as to a marriage of this character *per verba de præsenti: Davis* v. *Davis*, 7 Daly 308; and the same theory is affirmed by the Supreme Court of the United States in *Meister* v. *Moore*, 6 Otto 76.

Conceding, however, for the purpose of argument, the invalidity of the marriage in England, that upon the English Channel and the subsequent one in France next claim attention.

There was no proof of the nationality of the vessel in which parties sailed and the court cannot indulge in inferences upon this point: *Piers* v. *Piers*, 2 H. L. Cas. 331; *Morris* v. *Davis*, 5 Cl. & Fin. 163; Bishop on Mar. and Div. 457.

Assuming, then, as the verdict of the jury warrants, that the parties, who were able to contract, did contract a marriage with a view to a future residence in the state of New York, of which one of the contracting parties has been found to have been a resident, the presumption is in favor of the validity of the marriage: *Clayton* v. *Wardell*, 4 N. Y. 230; *Caujolle* v. *Ferrie*, 23 Id. 90; *Bissell* v. *Bissell*, 55 Barb. 325.

The testimony offered to prove the French law as to marriage did not meet the requirements of our statute. It demands that the authenticity of a foreign statute be established.

The testimony of Michael Rey (the witness called for that purpose), showed that he had not been in France since 1859, and the code of law produced was published subsequent to his departure from that country; moreover, the witness testified that there were codes of the French law edited or published by Seriat, Rogron, and by a great many other people (fo. 668.) What reliability can be placed upon such testimony? Does it establish as a fact what the law of France was when this marriage was alleged to have been contracted? Clearly not. Since 1859 that law may have been repealed, modified or so amended as to embrace the legality of the marriage in question. The defendants were bound to establish affirmatively what the law of France was at the time of this marriage.

I find no error in the refusal of the judge at trial to admit the testimony of the witness Loader in relation to a comparison of the handwriting of Mrs. Hynes. The rule is well settled that signa-

tures cannot be shown in evidence merely for the purpose of comparison, but only when the instrument to which they are affixed has been offered in proof of some other fact.: Whart. on Ev., § 712, 713; *Van Wyck* v. *McIntosh*, 14 N. Y. 439; *Moore* v. *United States*, 1 Otto 270.

I have reviewed the several exceptions in this case and find no substantial error in the rulings, it was tried upon the theory that a citizen of this state, temporarily sojourning abroad, should, so far as property in this state is concerned, be held to the consequences of his own act. The jury having found affirmatively on all the distinctive facts at issue, and no error of record appearing, the order and judgment appealed from should be affirmed with costs.

VAN BRUNT, J.—The rule seems to be well settled that the validity of a marriage is to be determined by the *lex loci contractus*. So well recognised had this rule become, that Congress in 1860 found it necessary to pass an act in relation to the marriage of American citizens in foreign countries.

American citizens had been in the habit of entering into marriage contracts at the various consulates, according to the law of their domicile, under the supposition that, as the consulate was under the American flag, the contract was to be deemed to have been entered into upon American soil, and therefore valid, and to be governed by the *lex domicilii*, no matter what might be the law regulating marriage of the country in which the consulate was situate.

This position, however, being recognised as entirely false, and that the *lex loci* determined the validity of such marriage, Congress, in 1860, passed an act providing that marriage, in the presence of any consulate officer of the United States, between persons who would be authorized to marry, if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if so solemnized within the United States.

It is true that decisions may be found applying the *lex domicilii* to such contracts, but in every such case the recognised rule of law has been put aside because of the hardship which it would work in that particular case.

The marriage in the case at bar which is alleged to have been entered into in London would seem to be void.

As to the marriage entered into upon the packet running between Dover and Calais, it would, it seems to me, to be a violent presumption to suppose that the vessel carried the American flag. The

vessel appears to have been one plying betweenDover, an English port, and Calais, a French port, only twenty-one miles distant.

The marriage, which the jury found was entered into in France, was not a ceremonial marriage, but an agreement of marriage entered into *per verba de præsenti.*

Such a marriage is valid according to the laws of the state of New York and to the common and civil law, and as there was no competent evidence given as to what the law of marriage is in France, as is shown by Judge LARREMORE'S opinion, the presumption is that the law of France is either the same as that of the state of New York, or the common or civil law ; and as the marriage contract found by the jury to have been entered into in France is valid by either of these laws, such marriage must be held by the courts of this state to be valid. The judgment must be affirmed with costs.

This case differs materially from *Sottomayer* v. *De Barros*, *ante*, p. 76, and indeed in many respects it is the converse of the latter, which, as presented to the English Court of Appeal, in Law Rep. 3 Prob. Div. 1, was that of a marriage prohibited by the *lex domicilii* of Portugal, except under the sanction of a Papal dispensation, which had not been obtained, both parties to the contract being subjects of Portugal and, as was supposed at the time, both being domiciled in Portugal. Under these circumstances the Court of Appeal decided that the *lex domicilii* must prevail, although all the requirements of the *lex loci* were complied with, and such a marriage was not *per se* prohibited in England. Upon a subsequent investigation the facts were modified to the extent that only one of the contracting parties, viz., the man, was domiciled in Portugal, the other being domiciled in England; and the case being re-opened in the court below, Sir J. HANNEN (Judge of the Court for Matrimonial causes), decided that the *lex loci* must govern the case. Sir R. PHILLIMORE, the other judge of the same court, had previously given his decision to the same effect, under the impression that both parties were domiciled in a foreign country. It was from his (Sir R. PHILLIMORE'S) decision that the appeal, reversing his judgment, was taken. In a previous number of the Law Register, *ante*, p. 76, we have fully discussed the case of *Sottomayor* v. *De Barros*. In the present case the man was a citizen of the United States, the woman being a British subject domiciled in England. Mr. Hynes, on the other hand, though temporarily resident in England, was domiciled in New York, where marriages *per verba de præsenti*, without the intervention of a person in holy orders, are legal. A marriage of that description between these parties had taken place in England; had been renewed on board ship in crossing the British channel to France, and again renewed in France, at least by repeated acknowledgments to friends and acquaintances, accompanied by cohabitation.

Such a marriage has been by the Court of Common Pleas in General Term of New York to be a valid marriage in the state of New York. Whether such would be held good in England and France, or in either, remains yet to be decided. The whole of the property in this case being situated in the United States it will be unnecessary to make such inquiry. But were it otherwise we might possibly witness the unseemly result of a marriage

deemed good in the United States, yet adjudged invalid in other countries; a right to dower, indefeasible on this side the Atlantic, repudiated on the other; children legitimate in one country, but illegitimate in others. We are far, however, from prejudging a case that may yet arise. Marriages *per verba de præsenti* have never been absolutely abolished in England, though celebration of such cannot be enforced by any ecclesiastical or matrimonial court: 20 Geo. 2, c. 33, s. 13; *The Queen* v. *Millis*, 10 Cl. & Fin. 841. It was insisted that even in such marriages the presence of a priest in holy orders, under some ancient Saxon canons of King Edmund (A. D. 940), had always been an essential requisite. Such canons, even obsolete in England, where ever since the Reformation a deacon, and not a mass priest, which these canons required, has been in practice allowed to officiate, were never imported into the American colonies, where the common law of England prevails, unless specially abrogated by state legislation; therefore the *lex domicilii*, the simplest form of marriage by words of present import and intent, even without the presence of witnesses, must if accepted at all by the foreign judicature, be accepted unshackled. The mere want of witnesses, remarked Mr. Justice WILLES, in *Beamish* v. *Beamish*, 9 H. L. Cas. 308, never invalidated a marriage, "*that* created a difficulty of proof only, and did not affect its validity."

In *The Queen* v. *Millis*, before referred to, Lord BROUGHAM said, in the course of his opinion, "It is clear that by the universal law of Europe before the Council of Trent this contract could be validly solemnized by the parties consenting to take each other for man and wife without the intervention of the sacerdotal office or the *presence of any one in holy orders*. The Council of Trent required, and for the first time required, the marriage to be in the presence of a priest. But the Council of Trent never was received or acknowledged in England. But if the Council of Trent never was recognised in England, have we not a right to fall back upon the common and universal law of Europe as our own in this important matter?" Certainly the decrees of the Council of Trent were never received in America any more than were the Saxon canons of King Edmund. The stat. of 4 Geo. 4, c. 76, annuls all marriages not solemnized in accordance with its provisions if the parties do so *wilfully* and *knowingly*. To say nothing of the difficulty of proving *wilfulness* and *knowledge* of the national marriage law, on the part of a foreigner, can such a statute bind other than the subjects of the country to which it relates, in the face of the assurance of Lord Chief Justice TINDAL, in *The Queen* v. *Millis*, that "these contracts (*per verba de præsenti* and *per verba de futuro cum copulâ*) are still *lawful*, though they cannot be enforced in any ecclesiastical court." And again, Chief Justice GIBBS, in *Lautour* v. *Teesdale*, 8 Taunt. 837, says, after citing authorities quoted by Sir W. SCOTT (Lord STOWELL) in *Dalrymple* v. *Dalrymple*, Hagg. Const. R. 54: "It appears that a contract of marriage *per verba de præsenti* is considered to be an actual marriage, though doubts have been entertained whether it be so unless followed by cohabitation." But without further laboring this point the simple question involved in both *Sottomayor* v. *De Barros* and *Hynes* v. *McDermott* was, is the *lex domicilii* to prevail over the *lex loci*, either where both parties are foreigners domiciled at home, or where both being foreigners, only one is domiciled at home, or where only one is a foreigner domiciled in a foreign country, and the other a subject of the state of the *lex loci* and domiciled there? And further, if the *lex domicilii* is to prevail in a case where even the *lex loci* has been complied with and where no prohibition exists in the latter country, is it not in *a fortiori* case the *lex domicilii* should prevail where it

has formed the basis and evidence of the contract, no prohibition existing in the *lex domicilii*, and no proof of *wilfully* or *knowingly* evading the *lex loci* on the part even of the natural born subject of the country where such marriage contract was effected, such subject being the woman who, if the contract be that of marriage *ipso facto* acquires her husband's domicile and nationality? 33 & 34 Vict. c. 14, s. 10, and Dig. 50, l. 37; Code xii. l. 13; x. 40, 9. In a recent case before the English High Court of Justice, Court of Appeal, viz., *Brittain* v. *Rossiter*, 18 Am. Law Reg. N. S. 716, it was held, that a verbal contract was not made absolutely void by the Statute of Frauds, s. 4, but was an existing contract, though not enforceable. In that case BRETT, L. J., said, "I think, on the true view of the case, it is not right to say that the first contract is void absolutely, because it is within the Statute of Frauds. There is a contract, but no person can be charged upon it in a court of law." And further on, he adds that in *Leroux* v. *Brown*, 12 C. B. 801, JERVIS, C. J., and MAULE, J. "gave a clear decision, that a contract, made in words, which is within the 4th section of the Statute of Frauds, is not void, because it has not been reduced into writing, but only that it cannot be enforced, nor anything depending on it, in any *English court of law*." Also, in the same case of appeal, COTTON, L. J., says, "I am of opinion, that under the statute the verbal contract was an existing contract, but was not enforceable."

THESIGER, L. J., confirms this view when he says, "I think it is clear that it is not void for all purposes, and it is a real, existing contract though not enforceable." * * * "When a contract is not enforceable within the Statute of Frauds, it is still an existing contract." These opinions are here cited to show that a contract is not the less a contract because the terms of a statute have not been complied with. Such want of compliance may render it unenforceable in an *English court of law*, but it is still an existing contract. It cannot be enforced "nor anything depending on it." But "it is not *void* for all purposes." It is true that in *Carrington* v. *Roots*, 2 M. & W. 248, Mr. Baron PARKE, said, "the contract being *void* by the statute, the action cannot be maintained." But as COTTON, L. J., in giving his opinion in *Brittain* v. *Rossiter*, explains—"When he (Baron PARKE), says a 'void' contract, he means it is not a contract that one party could, as a matter of right, enforce against another." Now marriage is not merely a contract but a status. At least such is its English definition. The incidents of that status may not be enforceable by English law for want of compliance with a statute or statutes, but if the contract is *verum matrimonium* it nevertheless subsists.

The question that suggests itself in the principal case, is as follows: Does the *lex domicilii* form an exception to the rules that govern the *lex loci?* Though according to the *lex loci* such a contract as we have been considering cannot be enforced, yet being a contract springing out of the *lex domicilii*, do the English Marriage Acts apply to it at all? If the *lex domicilii* is recognised by the English courts in such a case, surely the incidents of the status must attach. It is granted that they would not if the contract rested with the *lex loci*. Then the contract, through the operation of the Marriage Act, would, like a contract within the Statute of Frauds, not be enforceable. This question cannot remain long undecided. Sir J. HANNEN seems to think that a marriage effected in England between persons domiciled elsewhere, must nevertheless be judged by the *lex loci*. The Lords Justices of Appeal, in the same case (*Sottomayor* v. *De Barros*), appear to be of a contrary opinion, at least where such marriages are prohibited by the *lex domicilii*. Then why not where they are permitted by the *lex domicilii?* Sir J. HANNEN, in his

luminous judgment, seems to be of opinion that it would be impossible for the English courts to constitute themselves judges of the *lex domicilii* of every country. The *lex loci* is their only guide. Thus the matter rests for the present, as far as the *Sottomayor* v. *DeBarros Case* is concerned.

Before concluding it is well to observe that it is now settled, that by the law of England the *lex domicilii* and not the *lex loci rei sitæ* governs the distribution of and succession to personal property in intestacy or testacy: *Somerville* v. *Somerville*, 5 Ves. 754; *Gambier* v. *Gambier*, 7 Sim. 263, and numerous other cases. Also the liability to succession duty, which relates to real estate: *Callanane* v. *Campbell*, 24 Law Times R. (N. S.) 175. M. R. The law of the domicile of origin must yield to that of the *situs* of real property, or to that of the *domicile of the deceased*, according to the nature of the property which is the subject of litigation: 1 Burge on Foreign Law, pp. 111, 112. These rules have an important bearing on the legitimacy or illegitimacy of children, dependent upon the respective laws of different countries on the validity of marriages, or the effect, for instance, of *subsequent matrimonium* on *ante nati* children.

In a message (December 7th 1875) of President Grant to Congress, attention was called to the necessity of legislation concerning the marriages of American citizens, contracted abroad, and concerning the status of American women who may marry foreigners and of children born of American parents in a foreign country.

The only other point to be considered in the *Hynes's case*, is the effect of a marriage *per verba de præsenti* on board ship. Now "the high seas," says Phillimore, p. 377, are not subject to the jurisdiction of any state," and no marriage laws of any particular state, can have any extra-territorial jurisdiction. The utmost that any nation can require of ships sailing under its flag, is that some entry in the log should be made of any such transaction, and this is done by the English Merchant Shipping Act (1854) 17 & 18 Vict. c. 104, s. 282, as follows, "every master of a ship for which an official log-book is hereby required, shall make or cause to be made therein entries of the following matters (that is to say)" *inter alia* "every marriage taking place on board, with the names and ages of the parties."

But this is merely directory, and the master may possibly forfeit his certificate for neglect of this duty. But as we have seen, want of witnesses never invalidated a marriage (*Beamish* v. *Beamish*, 9 H. L. Cas. 308), and as the only description of marriage that can be affected on board ship, for want of any special jurisdiction, is a common or rather universal law marriage, where no witnesses are necessary, the master might well be in ignorance of the proceeding. This is tacitly admitted by the statute just quoted, as merchant ships are not in the habit of carrying chaplains, neither are churches, chapels, registrars' offices, nor registrars to be found on board, and yet the possibility of marriages there taking place, is evidently contemplated by the statute. The same observations apply to ships of all nations, whatever rules prevail for the convenient authentication of the contract.

The flag or nationality cannot on the high seas control the common or civil law of Christendom.

It only remains to remark that there being no proof before the court, in the *Hynes's Case*, of the state of the marriage law in France, the ancient universal law of Europe must be presumed still to prevail in that country, at least as far as foreigners are concerned. Neither is this a violent presumption, as it is matter of history that the decrees of the Council of Trent were never received in France, although an ordinance of Blois, supplemented by a declaration of Louis XIII. (A. D. 1639), was is-

sued to a similar effect. But this ordinance and declaration were swept away with the monarchy, by the tide of the great French Revolution, and in a country so prolific of revolutions, it is difficult to predicate from the past the existence of any particular law at the present. Indeed we believe that at one period of French Revolutionary history, the only mode of contracting marriages was *per verba de præsenti*, and that all religious ceremonial was expressly forbidden by law, or at least was rendered impossible by the repudiation of Christianity, itself, and that no civil record of such marriage contracts was established even for the purpose of legal authentication. At all events the lack of proof in the case before us, of the present state of the French law precludes the necessity of any further inquiry in that direction, and upon this view the court appears to have acted in forming its opinion.

An opinion expressed by Lord Chief Justice COCKBURN, in his interesting tract on "Nationality," published by Ridgway, London, that "it is quite possible for a person to have two domiciles," might tend to further complicate such cases as the present, were it not that his lordship appears to be confounding *residence* with domicile. A man undoubtedly may have many residences in different countries, and though, in common *parlance*, they may all be spoken of as domiciles, yet as the Master of the Rolls observed in *Somerville* v. *Somerville*, *supra*, the court had to decide "which of the two domiciles should preponderate, or rather, which is the *domicile* according to which the personal estate shall be regulated." In the words of Chancellor KENT, "a man can have but one domicile for the purpose of succession." Kent's Com., l. 37, s. 41 note.

With all due deference to such an authority as Lord Chief Justice COCKBURN, he can scarcely be taken as speaking judicially in the sentence above quoted, and we only refer to it, lest it should mislead in construing "domicile" in its technical and not merely conventional sense.

HUGH WEIGHTMAN.

Supreme Court of the United States.

NATIONAL SAVINGS BANK OF THE DISTRICT OF COLUMBIA *v.* WILLIAM H. WARD.

Attorneys employed to examine the title to real estate, whether in view of a conveyance or of a security for money to be loaned, impliedly contract with their employer to exercise reasonable care and skill in the performance of the undertaking.

When a person adopts the legal profession and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties, and if injury results to the client from the want of such care and skill, the attorney may be held to respond in damages to his client for the injury sustained.

Persons acting professionally in legal formalities, negotiations or proceedings, by authority or request of clients, must be regarded in the capacity of attorneys at law within the above rules.

Where there is neither fraud, falsehood nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of the designated service is to the client and not to a third party, the rule being that the attorney, where no such wrongful elements exist, is not liable for the want of reasonable care